



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 21 OF 2012

REPUBLIC.....PROSECUTOR

VERSES

SAMSON KAMAU NJOROGE.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge was that on the **night of 9th and 10th May, 2012 at [particulars withheld] area within Trans Nzoia County murdered AWK**.

2. The accused denied the offence and the prosecution called 6 witnesses to establish its case. Ultimately the accused was placed on his defence where he gave unsworn evidence. Before looking at the merits or otherwise of the matter it shall be necessary to summarise the evidence as was presented during the hearing.

3. **PW1 JKM** testified that he was the father to the deceased whom she found out that she was pregnant in the year 2008. The deceased told them the accused was responsible for the pregnancy. He sent an elder to the accused's father but there was not much results since his father also denied. The deceased gave birth to a son whom she called JK.

4. The witness said that he learned later that there was a children case between the deceased and the accused over the same child. He said that on 9th May, 2012 the deceased had gone to look for employment and she knew that she was staying with her sister.

5. On 10th May, 2012 his wife told him about the distress call the deceased had made to her sister W saying that she had been kidnapped and she was being raped. Later on the 14th May 2012 he received the report from his sons concerning her death and the retrieving of her body from the well.

6. **PW2 EW** testified that she was an aunty to the deceased. She said that she saw a message in her phone which emanated from the deceased phone indicating that she had been tied with a rope and was being raped. She called her mother and they decided to report to the police.

7. The police began their investigations. Meanwhile there was someone flashing on the phone but was not talking and he said that he was Musa. On the 14th she was called and informed that the body had been found at the accused borehole within the compound. She also testified that she attended the post-mortem and saw the injuries she had sustained.

8. **PW3 PWK** testified that the deceased was her sister and that she had a child with the accused. She said that she received message from PW2 concerning the incident. She reported the matter at the police station that night. There were calls which she received which she learned that they emanated from the accused co-accused who has earlier been set free in this matter for lack of sufficient evidence to place him on his defence.

9. She said that the flashing of the phone continued till the following day when the said co-accused was arrested. On the 13th they met the accused wife, Tabitha who told them she did not sleep at her home and that the accused had come home with a blood stained clothes. She was also present when the boreholes padlock was broken by the police and the deceased body retrieved from inside. She saw the body which had cloves on the hands and had injuries on the head.

10. **PW4 DR OKUMU MOSES** produced the post-mortem report prepared by DR GAKUNDI whom he had worked with. He opined that the cause of death was cardiopulmonary failure due to haemorrhage due to cut wounds on the skull.

11. **PW5 CORP. BENJAMIN KOONO** from the crime scene department at Kitale police station produced several sets of photos he took at the scene which depicted the scene generally, the borehole as well as the deceased body. He also produced photos of the accused motor

vehicle. He said that the vehicle was towed from the scene and later dusted for fingerprints at the police station. He said that the said vehicle also contained some blood stains which among others were taken for analysis.

12. **PW6 VERONICA NJERI WAMBOI** testified that she had been the accused maid for over 2 years having been employed by his wife. She said that on the 9th May, 2012 the accused went to work but did not arrive that evening. He arrived very early the following day at 6.30 am. She then took tea and sent her to buy sugar. She was with Lucy his sister in law. When she came back from the shop she found him washing his clothes, something she found unusual. He also washed the car.

13. She said that she saw the clothes which had been hanged to dry and since there were some brown stains she decided to rewash them. He then went to his work but did not use the car. At around 11.00 am some 6 people came and asked if that was the accused homestead and she informed that that she stayed with the accused and others and that she had not seen any visitors. They told her that they were looking for a lady called W who had been kidnapped.

14. She then informed the accused's wife who told her to notify the accused which she did. On Saturday they were with the accused wife when they realised the padlock to the borehole was new. They looked for the key in vain and she appeared very disturbed.

15. On Sunday she went to church and came back home. At night the accused wife took her phone and went away for about 2 hours. She came back and left that night and she did not sleep at home. At 1.00 am vehicles arrived at the compound and the accused open the gate and she realised that they were the same police officers. They left with the accused.

16. They came later in the company of the police where they broke the padlock to the borehole and retrieved the body.

17. In his unsworn defence the accused denied the charge but stated that there was a children's case pending in court between her and the deceased and that in fact on the 9th April, 2012 they were together in court. The accused then narrated how he went after leaving his place of work on a drinking spree the whole night and he was not able to arrive home as the road was muddy and he was drunk

18. He arrived home at 7.30 am and he washed his clothes and the car. His wife was not happy and this strained their relationship that weekend. He received information from PW6 about some people who were looking for him. The wife then left him at night and did not come back. Later the police came in the night and picked him. They came back with the police the following day and the body retrieved from the borehole.

19. He denied the offence generally and questioned why the results of the blood sample were not produced as well as the padlock and other items taken from his compound by the police.

ANALYSIS AND DETERMINATION

20. The court received the closing written submissions from the prosecution and not the defence. Having looked at the entire spectra of the evidence presented, it is clear that there was no eye witness to the incident and thus any conclusion shall be based on circumstantial evidence.

21. There is no doubt that there was a children case pitting the accused and the deceased over a child called JK. Though the citation was not provided by either side the same was not in dispute and it appears that the accused was with the deceased in court over the same.

22. The evidence of PW6 in my view is central to these proceedings. The said witness was a maid in the accused home for over two years. This was not controverted. The witness said that the accused came home early that morning having slept out. He then saw him washing the car and his clothes. She said that it was peculiar to see her boss wash his own clothes.

23. The washing of the clothes was not contested by the accused. PW6 said that she had to rewash the clothes again as they were not well washed. In the course of rewashing she saw the brown substance which she was unable to tell whether it was mud or vomit as suggested during cross examination.

24. What I found interesting was the fact that the said pw6 saw that her boss appeared very disturbed throughout a fact which came clearly when his wife left leaving the baby crying.

25. The scene of crime officer testified that when he dusted the accused's car he found some bloodstains. Though the Investigating Officer was not call to testify and the results from the government chemist not produced it may not be farfetched to conclude that the accused was actually beside washing the blood-stained clothes was also washing the blood which was on the car.

26. The body of the deceased was found tied and this goes to confirm what PW2 stated that she had received a text message from the deceased that she had been tied and was being raped.

27. The accused unsworn evidence was of no probative value as he did not offer any chance of cross examination. He did not deny nevertheless that he had an issue of child maintenance at the children's court. As stated earlier this is a case purely to be decided on circumstantial evidence.

28. In the now famous case of **SAWE VR. REP (2003)**, the court of Appeal stated that;

“in order to justify on circumstantial evidence, the inference of guilt, and the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.....”

29. I do not find the accused innocent. His movements from the time they parted ways with the deceased at the courts appear suspicious. There was no sufficient reason why the accused would sleep in the car that night allegedly because he was drunk. In any case he did not call any of his drinking buddies at least to verify if it was true although legally speaking he had no obligation to do so.

30. The question of washing his clothes baffled his maid, pw6. To her save for the car, she had never seen the accused wash his clothes. The brown substance that made her rewash the clothes which were already on the hanging lines must have been the deceased blood. The same were found inside the car.

31. Finally why would the deceased body be found at the borehole in the accused compound? Who from outside will take such dangerous task without fear of being caught? I do not think a stranger or an outsider would do such including buying a new padlock. This must have been someone who knew the area very well including the key to the older padlock. This must have been the accused.

32. The child case between him and the deceased must have been the catalyst that caused the incident. There was friction already taking into account the evidence of PW1, the deceased father who had attempted settlement in vain.

33. In conclusion, I find that the prosecution have proved malice aforethought on the part of the accused. The whole idea of murdering the deceased was to avoid the responsibility of taking care of two families as it were.

34. The accused is therefore convicted of murder under the provisions of Section 203 of the Penal Code.

Dated, signed and delivered in open court at Kitale this 7th day of August, 2019.

H K CHEMITEI

JUDGE

7/8/19

In the presence of:-

Mr. Omoria for State

Onyancha Advocate for the Accused

Accused - present

Barongo Advocate holding brief for the Family

Court Assistant – Kirong

Judgment read in open court.